

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TERRANCE LEDERR LAVOLL,

Plaintiff,

vs.

D. W. NEVEN, et al.,

Defendants.

Case No. 2:08-CV-00011-PMP-(GWF)

ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#7), respondents' answer (#35), and petitioner's reply (#40). The court finds that relief is not warranted, and the court denies the petition.

After a jury trial in the Eighth Judicial District Court of the State of Nevada, petitioner was convicted of one count of sexual assault on a minor under the age of sixteen years, two counts of sexual assault on a minor under the age of sixteen years with the use of a deadly weapon, and one count of solicitation of a minor to engage in acts that constitute the crime against nature. Ex. 21 (#23). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 59 (#25). Petitioner then filed in state court a post-conviction habeas corpus petition. Ex. 68 (#25). The district court denied the petition. Ex. 105 (#26). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 122 (#26).

Petitioner then commenced this action. Respondents moved to dismiss (#21) grounds 1, 3, 5, 7, 9, and 10 of the petition (#7). Respondents argued that petitioner procedurally defaulted those grounds because he could have raised them on direct appeal but did not. Petitioner

1 did not oppose the motion. The court agreed with respondents that those grounds were procedurally
2 defaulted, and the court dismissed those grounds. Order (#28). The state-law reason for the
3 dismissal of those grounds is independent of federal law and adequate for a procedural default.
4 Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003). Cause and prejudice to excuse the
5 procedural default were never at issue because petitioner did not oppose the motion to dismiss
6 (#21). Consequently, reasonable jurists would not find the court's conclusion to be debatable or
7 wrong, and the court will not issue a certificate of appealability on the dismissal of grounds 1, 3, 5,
8 7, 9, and 10 as procedurally defaulted.

9 “A federal court may grant a state habeas petitioner relief for a claim that was
10 adjudicated on the merits in state court only if that adjudication ‘resulted in a decision that was
11 contrary to, or involved an unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States,’” Mitchell v. Esparza, 540 U.S. 12, 15
13 (2003) (quoting 28 U.S.C. § 2254(d)(1)), or if the state-court adjudication “resulted in a decision
14 that was based on an unreasonable determination of the facts in light of the evidence presented in
15 the State court proceeding,” 28 U.S.C. § 2254(d)(2).

16 A state court's decision is “contrary to” our clearly established law if it “applies a
17 rule that contradicts the governing law set forth in our cases” or if it “confronts a set
18 of facts that are materially indistinguishable from a decision of this Court and
19 nevertheless arrives at a result different from our precedent.” A state court's decision
20 is not “contrary to . . . clearly established Federal law” simply because the court did
not cite our opinions. We have held that a state court need not even be aware of our
precedents, “so long as neither the reasoning nor the result of the state-court decision
contradicts them.”

21 Id. at 15-16. “Under § 2254(d)(1)'s ‘unreasonable application’ clause . . . a federal habeas court
22 may not issue the writ simply because that court concludes in its independent judgment that the
23 relevant state-court decision applied clearly established federal law erroneously or incorrectly.
24 Rather, that application must be objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63,
25 75-76 (2003) (internal quotations omitted).

26 [T]he range of reasonable judgment can depend in part on the nature of the relevant
27 rule. If a legal rule is specific, the range may be narrow. Applications of the rule
28 may be plainly correct or incorrect. Other rules are more general, and their meaning
must emerge in application over the course of time. Applying a general standard to
a specific case can demand a substantial element of judgment. As a result,

1 evaluating whether a rule application was unreasonable requires considering the
2 rule's specificity. The more general the rule, the more leeway courts have in
reaching outcomes in case-by-case determinations.

3 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

4 The petitioner bears the burden of proving by a preponderance of the evidence that
5 he is entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

6 In all surviving grounds for relief, petitioner claims that counsel provided ineffective
7 assistance. "[T]he right to counsel is the right to the effective assistance of counsel." McMann v.
8 Richardson, 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of
9 counsel must demonstrate (1) that the defense attorney's representation "fell below an objective
10 standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the
11 attorney's deficient performance prejudiced the defendant such that "there is a reasonable
12 probability that, but for counsel's unprofessional errors, the result of the proceeding would have
13 been different," id. at 694. "[T]here is no reason for a court deciding an ineffective assistance claim
14 to approach the inquiry in the same order or even to address both components of the inquiry if the
15 defendant makes an insufficient showing on one." Id. at 697.

16 Strickland expressly declines to articulate specific guidelines for attorney
17 performance beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of
18 interest, the duty to advocate the defendant's cause, and the duty to communicate with the client
19 over the course of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel's
20 duties so exhaustively as to give rise to a "checklist for judicial evaluation of attorney
21 performance. . . . Any such set of rules would interfere with the constitutionally protected
22 independence of counsel and restrict the wide latitude counsel must have in making tactical
23 decisions." Id. at 688-89.

24 Review of an attorney's performance must be "highly deferential," and must adopt
25 counsel's perspective at the time of the challenged conduct to avoid the "distorting effects of
26 hindsight." Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that
27 counsel's conduct falls within the wide range of reasonable professional assistance; that is, the
28

1 defendant must overcome the presumption that, under the circumstances, the challenged action
2 ‘might be considered sound trial strategy.’” Id. (citation omitted).

3 The Sixth Amendment does not guarantee effective counsel per se, but rather a fair
4 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.
5 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell
6 below an objective standard of reasonableness alone is insufficient to warrant a finding of
7 ineffective assistance. The petitioner must also show that the attorney’s sub-par performance
8 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability
9 that, but for the attorney’s challenged conduct, the result of the proceeding in question would have
10 been different. Id. at 694. “A reasonable probability is a probability sufficient to undermine
11 confidence in the outcome.” Id.

12 If a state court applies the principles of Strickland to a claim of ineffective assistance
13 of counsel in a proceeding before that court, the petitioner must show that the state court applied
14 Strickland in an objectively unreasonable manner to gain federal habeas corpus relief. Woodford v.
15 Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

16 In ground 2, petitioner argues that counsel provided ineffective assistance because
17 counsel did not investigate whether the justice court had jurisdiction over petitioner. On this issue,
18 the Nevada Supreme Court held:

19 First, appellant claimed that his trial counsel was ineffective for failing to assert that
20 the district court was without jurisdiction as the State failed to file a complaint at
21 appellant’s first appearance in the justice court. He asserted that NRS 171.178(4)
22 mandated that a complaint must have been filed when he was presented before the
23 magistrate for the first time. Appellant did not establish that his counsel was
24 deficient or that he was prejudiced by his counsel’s actions. Appellant appeared
25 before the justice court within forty-eight hours of his arrest, and the justice court
26 determined that appellant’s arrest was supported by probable cause. The justice
27 court further ordered the State to file a complaint within four days. The State filed a
28 complaint, and later filed an amended complaint, and the justice court bound over
appellant based on the charges in the amended complaint after a preliminary hearing.
Appellant failed to demonstrate that the district court did not have jurisdiction to
proceed because the State had not filed a complaint by the time appellant was first
presented in the justice court. Therefore, the district court did not err in denying this
claim.

Exhibit 122, pp. 3-4 (#26) (citing, inter alia, County of Riverside v. McLaughlin, 500 U.S. 44, 56
(1991)) (footnotes omitted). The Nevada Supreme Court identified the relevant constitutional

1 principle established by the Supreme Court of the United States, that a magistrate must make a
 2 determination of probable cause within 48 hours of a warrantless arrest. The Nevada Supreme
 3 Court also was correct in noting that such a determination was made within that time. Regarding
 4 the timing of the filing of the complaint, the Nevada Supreme Court's interpretation of state law is
 5 final. Given that the underlying ground had no merit, the Nevada Supreme Court's determination
 6 that counsel did not provide ineffective assistance was a reasonable application of Strickland.
 7 Reasonable jurists would not find this court's determination to be debatable or wrong, and the court
 8 will not issue a certificate of appealability on the issue.

9 Ground 4 has two components. First, petitioner argues that counsel should have
 10 objected to the filing of the amended information. On this issue, the Nevada Supreme Court held:

11 Second, appellant claimed that his trial counsel was ineffective for failing to object
 12 to the filing of the amended information that added a charge inadvertently omitted
 13 from the original information. Appellant failed to establish that his counsel was
 14 deficient or that he was prejudiced by his counsel's actions. At the preliminary
 15 hearing, the district [sic] court found that there was probable cause to proceed to trial
 16 on all four counts of the amended complaint. Several days later, the State filed an
 17 information that omitted the first count of the amended complaint. Then, on the first
 18 day of trial, the State filed an amended information to include all of the counts in the
 19 amended complaint, the counts upon which the justice court had bound over
 20 appellant. The amended information merely corrected a clerical error within the
 21 original information prepared by the State. Therefore, the filing of the amended
 22 information did not add an "additional or different offense," to those for which
 23 appellant had already been bound over and provided notice. Further, as he was
 24 aware of the amended count, appellant's substantial rights were not prejudiced.
 25 Therefore, the district court did not err in denying this claim.

26 Ex. 122, pp. 4-5 (#26) (citing Nev. Rev. Stat. § 173.095(1)) (footnote omitted). The original
 27 criminal complaint against petitioner had three counts, with the victims' initials in parentheses:¹

28 Count I: Sexual assault with a minor under sixteen years of age with use of a deadly
 weapon (E. H.);
 Count II: Sexual assault with a minor under sixteen years of age with use of a
 deadly weapon (I. B.);
 Count III: Solicitation of minor to engage in acts constituting crime against nature
 (N. B.).

29 Ex. 3 (#23). Before the preliminary hearing in the justice court, the prosecution filed an amended
 30 criminal complaint with a new first count and the original three counts renumbered accordingly:

¹Pursuant to Special Order 108, the Court has redacted the names of the minor victims.

Count I: Sexual assault with a minor under sixteen years of age (E. H.);
 Count II: Sexual assault with a minor under sixteen years of age with use of a
 deadly weapon (E. H.);
 Count III: Sexual assault with a minor under sixteen years of age with use of a
 deadly weapon (I. B.);
 Count IV: Solicitation of minor to engage in acts constituting crime against nature
 (N. B.).

Id. At the preliminary hearing, the justice of the peace bound petitioner over for trial on all four counts of the amended complaint. Ex. 4, p. 73 (#23). The written commitment and order to appear reflect the verbal order of the justice of the peace. Ex. 5 (#23). The prosecution then used erroneously the original criminal complaint as the basis for filing the original information in the state district court, because the original information contained only the three counts of the original criminal complaint. See Ex. 8 (#23). Right before trial, the prosecution filed an amended information that contained all four counts on which petitioner was bound over for trial. Ex. 10 (#23). In a colloquy on the matter, defense counsel Craig Jorgenson admitted that he knew that the original information was missing a count, and Jorgenson hoped that the prosecution would not notice the omission. He stated that he was not objecting to the filing of the amended information because he knew about the omitted count. Ex. 11A, p. 5 (#23). At the evidentiary hearing in the state habeas corpus proceedings, Jorgenson showed that he knew about the background behind the prosecution's error and ultimate correction of that error. Ex. 103, pp. 15-16 (#26). The Nevada Supreme Court's determinations of fact were reasonable in light of the evidence in the record. 28 U.S.C. § 2254(d)(2). Given that there was nothing for counsel to object, the Nevada Supreme Court's determination that counsel did not provide ineffective assistance was a reasonable application of Strickland. Reasonable jurists would not find this conclusion to be debatable or wrong, and the court will not issue a certificate of appealability on the matter.

In the second part of ground 4, petitioner argues that counsel should have objected to the amendment of the information because the amendment introduced evidence of prior uncharged acts. Respondents correctly note that because the conduct at issue was the subject of Count I of the amended information, by definition it cannot be evidence of an uncharged act. Answer, p. 11 (#35). On this issue, the Nevada Supreme Court held similarly:

1 Third, appellant claimed that his trial counsel was ineffective for failing to file
2 motions to discover his prior bad acts and prevent the State from introducing those
3 acts into evidence. Specifically, he asserted that the conduct charged in Count 1 of
4 the amended information should not have been introduced into evidence. Appellant
5 failed to establish that his counsel was deficient or that he was prejudiced. We have
6 said “that the use of uncharged bad act evidence to convict a defendant is heavily
7 disfavored.” However, the evidence related to the acts described in Count 1, did not
8 relate to an uncharged bad act, but to a charged crime. Therefore, the district court
9 did not err in denying this claim.

10 Ex. 122, pp. 5-6 (#26) (footnote omitted). Given that the evidence presented in support of Count I
11 was evidence of a charged act, the Nevada Supreme Court reasonably applied Strickland when it
12 held that counsel did not provide ineffective assistance when he did not object to the use of
13 evidence of prior uncharged acts. Reasonable jurists would not find this conclusion to be debatable
14 or wrong, and the court will not issue a certificate of appealability on the issue.

15 In ground 6, petitioner claims that counsel provided ineffective assistance because
16 counsel did not object to jury instructions regarding reasonable doubt, sexual assault, solicitation of
17 a minor to engage in acts constituting the crime against nature, and the use of a deadly weapon. Ex.
18 14 (#24) contains the instructions.

19 On the reasonable doubt instruction, the Nevada Supreme Court held:

20 Fourth, appellant claimed that his trial counsel was ineffective for failing to object to
21 the jury instruction for reasonable doubt. Appellant failed to demonstrate that his
22 counsel’s performance was deficient or that he was prejudiced. The district court
23 gave Nevada’s statutory reasonable doubt instruction as set forth in and mandated by
24 NRS 175.211. This court has repeatedly held that the current statutory definition is
25 constitutional. Therefore, the district court did not err in denying this claim.

26 Ex. 122, p. 6 (footnotes omitted) (#26). Jury instruction 5 defined reasonable doubt. See Ex. 14
27 (#24). This instruction is exactly the same as the instruction that the United States Court of Appeals
28 for the Ninth Circuit determined was constitutional. Ramirez v. Hatcher, 136 F.3d 1209, 1211-15
(9th Cir. 1998). That court has also held that the issue is not worthy of a certificate of appealability.
Nevius v. McDaniel, 218 F.3d 940, 944-45 (9th Cir. 2000). The Nevada Supreme Court reasonably
applied Strickland when it determined that the lack of objection to the reasonable doubt instruction
was not ineffective assistance of counsel. Reasonable jurists would not find this conclusion to be
debatable or wrong, and the court will not issue a certificate of appealability on the issue.

1 On the instructions regarding sexual assault and solicitation, the Nevada Supreme
2 Court held:

3 Fifth, appellant claimed that his trial counsel was ineffective for failing to object to
4 the jury instructions for sexual assault and solicitation of a minor. Specifically,
5 appellant claimed that (1) the instruction for sexual assault was defective as it failed
6 to define “sexual aberration,” and (2) the solicitation and sexual assault instructions,
7 when read together, improperly implied that the crime of sexual assault was gender
8 neutral. Appellant failed to demonstrate that his trial counsel’s performance was
deficient or that he was prejudiced. The district court gave instructions for sexual
assault and solicitation of a minor that followed the language of the statutes. In
addition the terms used to define and penalize sexual assault are gender neutral.
Thus, appellant could be convicted for the sexual assault of a male victim.
Therefore, the district court did not err in denying this claim.

9 Ex. 122, pp. 6-7 (citing Nev. Rev. Stat. §§ 200.366(1), 200.364(2), 201.195) (footnotes omitted)
10 (#26). Jury instruction 11 defined sexual assault and sexual penetration. See Ex. 14 (#24). The
11 instruction followed the language of Nev. Rev. Stat. § 200.366(1) (sexual assault) and Nev. Rev.
12 Stat. § 200.364(1) (sexual penetration) that were in effect at the time. Jury instruction 17 defined
13 solicitation of a minor to commit the infamous crime against nature. See Ex. 14 (#24). Again, the
14 instruction followed the language of Nev. Rev. Stat. § 201.195. Petitioner’s argument about the
15 definition of “sexual aberration” has no basis. “Sexual aberration” is not an element of either
16 sexual assault or solicitation of a minor to commit the infamous crime against nature. Furthermore,
17 the phrase “sexual aberration” appears nowhere in the instructions, and thus there was no need to
18 define the term.

19 On the instruction regarding use of a deadly weapon, the Nevada Supreme Court
20 held:

21 Sixth, appellant claimed that his trial counsel was ineffective for failing to object to
22 the district court’s instructions for the use of a deadly weapon. He claimed that the
23 district court erred by instructing the jury about general intent where specific intent
24 to sexual assault the victim with the use of a deadly weapon is necessary to convict.
25 Appellant failed to establish that his counsel was deficient or that he was prejudiced.
26 The district court correctly instructed the jury that sexual assault is a general intent
crime. The court also correctly instructed the jury on the use of a deadly weapon.
The crime of sexual assault did not become a specific intent crime merely because
the State alleged that appellant used a deadly weapon during the commission of the
crime. Therefore, the district court did not err in denying this claim.

27 Ex. 122, p. 7 (citing Winnerford H. v. State, 915 P.2d 291, 294 (Nev. 1996), and Allen v. State, 609
28 P.2d 321, 322 (Nev. 1980)) (footnotes omitted). In Allen, the Nevada Supreme Court held, “In

1 order to 'use' a deadly weapon for purposes of NRS 193.165, there need not be conduct which
2 actually produces harm but only conduct which produces a fear of harm or force by means or
3 display of the deadly weapon in aiding the commission of the crime." 609 P.2d at 322. Jury
4 instruction 15 followed the language of Allen. See Ex. 14 (#24).

5 Objections to the instructions defining sexual assault, solicitation of a minor, and the
6 use of a deadly weapon would not have succeeded. The Nevada Supreme Court reasonably applied
7 Strickland when it held that the lack of objection was not ineffective assistance of counsel.
8 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court will not
9 issue a certificate of appealability on this issue.

10 In one sentence, petitioner also argues that counsel was ineffective because he asked
11 for an instruction on statutory sexual seduction. Statutory sexual seduction is a lesser included
12 offense of sexual assault, and it is common to ask for instructions on lesser included offenses. At
13 any rate, the jury found petitioner guilty of all charged counts of sexual assault, and thus the
14 instruction for the lesser included offense caused him no prejudice. Reasonable jurists would not
15 find this conclusion to be debatable or wrong, and the court will not issue a certificate of
16 appealability on this issue.

17 In ground 8, petitioner claims that counsel provided ineffective assistance because he
18 did not object to the introduction of photographs. The photographs are of two boys holding a gun,
19 and one boy holding an alcoholic drink, in petitioner's residence. The two boys did not testify at
20 trial. On this issue, the Nevada Supreme Court held:

21 Seventh, appellant claimed that his trial counsel was ineffective for failing to object
22 to the introduction of the photographs of appellant's bedroom with underage boys
23 holding a firearm and an alcoholic beverage. Appellant argued that the pictures were
24 prejudicial and were improperly admitted through E. H., as he was not depicted in
25 the pictures and could not testify to the authenticity of the gun or beverage.
26 Appellant failed to establish that his counsel was deficient or that he was prejudiced
27 by his counsel's failure to object to the introduction of the evidence. E. H. testified
28 that he had been to appellant's home, spent the night in appellant's room with A. P.
and C. L., played with appellant's firearm, and drank alcoholic beverages while at
appellant's home. E. H. had personal knowledge of the identities of those pictures,
appellant's room, appellant's firearm, and the liquor he ingested. E. H. could
identify the people, the room, the firearm, and the liquor bottle in a photograph and
thus, authenticate the photographs for admission. Further, the photographs were
relevant as they depicted the methods, about which E. H. testified, that appellant
employed to gain the trust of boys prior to sexually assaulting them. Moreover,

1 appellant did not demonstrate that the conduct pictured in the photographs was so
2 prejudicial that it substantially outweighed the photographs' probative value.
3 Therefore, the district court did not err in denying this claim.

4 Exhibit 122, pp. 8-9 (#26) (footnotes omitted). The Nevada Supreme Court has held that the
5 photographs were admissible evidence of other acts pursuant to Nev. Rev. Stat. § 48.045. Ground 7
6 was the claim that the photographs should not have been admitted. Petitioner procedurally
7 defaulted that claim. For the purposes of this order, the court assumes that the photographs were
8 admissible. Given that an objection to the admission of the photographs could not succeed, counsel
9 did not provide ineffective assistance by a lack of objection. The Nevada Supreme Court
10 reasonably applied Strickland. Reasonable jurists would not find this conclusion to be debatable or
11 wrong, and the court will not issue a certificate of appealability on this issue.

12 In ground 11, petitioner claims that counsel was ineffective for failing to object to
13 cumulative punishments, namely, the equal and consecutive sentences imposed for use of a deadly
14 weapon in Counts II and III. The Fifth Amendment's protection against double jeopardy does not
15 necessarily preclude cumulative punishments for a single prosecution. Missouri v. Hunter, 459
16 U.S. 359, 366 (1983). On this issue, the Nevada Supreme Court held:

17 Fifteenth, appellant claimed that his trial counsel was ineffective for failing to
18 challenge the constitutionality of NRS 193.165. He asserted that the statute resulted
19 in cumulative punishments that violated double jeopardy. This court stated that the
20 deadly weapon enhancements set forth in NRS 193.165 "does not create any separate
21 offense but provides an additional penalty for the primary offense," and thus, did not
22 violate the double jeopardy clause. As the statute was constitutional, appellant was
23 not prejudiced by counsel's failure to raise an objection to it. Therefore, the district
24 court did not err in denying his claim.

25 Exhibit 122, pp. 14-15 (#26) (footnotes omitted). In an earlier case, the Nevada Supreme Court
26 held:

27 In Missouri v. Hunter, 459 U.S. 359 (1983), the United States Supreme Court held
28 that the double jeopardy clause of the United States Constitution does not preclude a
29 state legislature from imposing cumulative punishments for a single offense. The
30 Court stated: "With respect to cumulative sentences imposed in a single trial, the
31 Double Jeopardy Clause does no more than prevent the sentencing court from
32 prescribing greater punishment than the legislature intended." Id. at 366. . . .

33 As noted above, NRS 193.165 clearly evidences a legislative intent to impose
34 separate penalties for a primary offense and for the use of a deadly weapon in the
35 commission of the offense. The statute imposes a separate term of imprisonment
36 "equal to and in addition to" the term of imprisonment imposed for the primary

1 offense. This separate prison term must be served consecutively to the term of
2 imprisonment imposed for the primary offense, and the legislature expressly
3 declared that NRS 193.165(1) "provides an additional penalty for the primary
4 offense." NRS 193.165(2). When the intention of the legislature is clear, it is the
duty of this court to give effect to such intention and to construe the language of the
statute so as to give it force and not nullify its manifest purpose.

5 Nevada Dept. of Prisons v. Bowen, 745 P.2d 697, 699 (Nev. 1987). The Nevada Supreme Court
6 reasonably applied Hunter when it determined that the deadly weapon enhancement does not violate
7 the Fifth Amendment. Consequently, an objection would not have succeeded, and thus the Nevada
8 Supreme Court reasonably applied Strickland. Reasonable jurists would not find this conclusion to
9 be debatable or wrong, and the court will not issue a certificate of appealability on this issue.

10 In ground 12, petitioner claims that appellate counsel provided ineffective assistance
11 by not raising on direct appeal the issues contained in the procedurally defaulted grounds 1, 3, 5, 7,
12 9, and 10. On the issues contained in grounds 1, 3, 5, and 7, the Nevada Supreme Court held:

13 First, appellate claimed that his appellate counsel was ineffective (1) for failing to
14 argue that the district court lacked jurisdiction to convict him because the State had
15 not filed a complaint at the time the [sic] of his initial appearance, (2) for failing to
16 argue that the prosecution improperly amended the information on the day of trial,
17 (3) for failing to argue that the jury instructions were erroneous, and (4) for failing to
argue that the photographs were improperly admitted. For the reasons discussed
above, we conclude that appellant did not establish that his appellate counsel was
ineffective for failing to raise these issues. Therefore, the district court did not err in
denying these claims.

18 Ex. 122, pp. 16-17 (#26). This was a reasonable application of Strickland for the reasons stated
19 above in grounds 2, 4, 6, and 8.

20 Next, petitioner claims that appellate counsel should have raised the issue presented
21 in ground 9. Ground 9 was a claim that hearsay was erroneously admitted. Petitioner's claim was
22 vague and conclusory, because he did not allege the specific instances of hearsay. The proper-
23 person supporting memorandum to his state habeas corpus petition, Ex. 69 (#25), is identical; in
24 fact, the petition (#7) in this action is a photocopy of his supporting memorandum. The
25 supplements to his state habeas corpus petition, Exhibits 93 and 97 (#26), do not elaborate on the
26 hearsay claim. On this issue, the Nevada Supreme Court held:

27 Third, appellant claimed that his appellate counsel was ineffective for failing to
28 argue that the district court erred in permitting the introduction of hearsay.
Specifically, appellant claimed that his counsel should have argued on appeal that N.

1 B.'s testimony that appellant "asked [N. B.] if [appellant] could suck [N. B.'s] penis"
2 was hearsay. Appellant failed to show that his counsel was deficient or that he was
3 prejudiced. As N. B. testified about what appellant said to N. B., the testimony was
not hearsay. Therefore, the district court did not err in denying this claim.

4 Ex. 122, p. 18 (#26) (footnotes omitted). In an omitted footnote, the Nevada Supreme Court noted
5 that petitioner raised a general claim that all of the victims' testimonies were based upon hearsay,
6 but that petitioner identified specifically only one statement. It is unclear from the state-court
7 record where petitioner raised that specific statement as an example of objectionable hearsay.
8 Nonetheless, given that the example is not hearsay, the Nevada Supreme Court reasonably applied
9 Strickland in holding that petitioner had failed to show that counsel was deficient or that petitioner
10 was prejudiced by a lack of objection to that statement. The Nevada Supreme Court's
11 determination that the general claim of hearsay does not identify specific statements is also a
12 reasonable application of clearly established federal law, because petitioner did not prove deficient
13 performance of counsel or prejudice with such a vague claim.

14 Next, petitioner claims that appellate counsel should have raised the issues presented
15 in Ground 10. Ground 10 contained three claims. First, the consecutive sentences for use of a
16 deadly weapon violated the prohibition against double jeopardy. The court's disposition of ground
17 11 also disposes of this claim. Second, insufficient evidence existed to establish that petitioner used
18 a deadly weapon in the commission of the crimes. The record belies this claim, because appellate
19 counsel did raise a claim that the evidence was insufficient to support the verdicts on the use of a
20 deadly weapon, and the Nevada Supreme Court rejected that claim. See Ex. 59, pp. 4-5 (#25).
21 Third, the order of restitution violated the prohibition against double jeopardy. Nevada authorizes
22 the judge to impose restitution where appropriate. Nev. Rev. Stat. § 176.033(1)(c). As with the
23 consecutive sentence for the use of a deadly weapon, the intent of the legislature governs whether
24 the imposition of restitution violates the prohibition of double jeopardy. Given that the legislature
25 of Nevada has authorized restitution, the judge's imposition of restitution did not violate the Double
26 Jeopardy Clause. See Missouri v. Hunter, 459 U.S. at 366. Consequently, counsel did not perform
27 deficiently, and petitioner was not prejudiced, by the lack of objection to restitution. Reasonable
28

1 jurists would not find this conclusion to be debatable or wrong, and the court will not issue a
2 certificate of appealability on this issue.

3 In ground 13, petitioner claims that counsel provided ineffective assistance by
4 conceding petitioner's guilt on the lesser included offense of statutory sexual seduction.

5 3. "Statutory sexual seduction" means:

6 (a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed
7 by a person 18 years of age or older with a person under the age of 16 years; or
8 (b) Any other sexual penetration committed by a person 18 years of age or older with
a person under the age of 16 years with the intent of arousing, appealing to, or
gratifying the lust or passions or sexual desires of either of the persons.

9 Nev. Rev. Stat. § 200.364. On this issue, the Nevada Supreme Court held:

10 Eighth, appellant claimed that his trial counsel was ineffective for conceding his
11 guilt during closing arguments. He asserted that his counsel erred in asserting that
12 statutory sexual seduction was the appropriate conviction instead of sexual assault.
Appellant stated in his affidavit that he did not consent to his counsel's concession.

13 Appellant failed to establish that his counsel was deficient or that he was prejudiced.
14 Appellant did not testify at trial. Thus, trial counsel's concession did not undermine
15 any testimony by appellant. Further, the record supports the concession as part of
16 the defense strategy. Trial counsel's cross-examination focused on whether the
17 victims consented to the acts performed by appellant; therefore, trial counsel's
18 closing argument was consistent with the defense strategy at trial. At the evidentiary
hearing, appellant's post-conviction counsel did not ask appellant's trial counsel
whether appellant consented to the closing argument. In light of appellant's single
avermnt, which contradicted the apparent trial strategy, and the lack of development
of further evidence at the evidentiary hearing despite the opportunity to do so, we
conclude that the district court did not err in denying appellant's claim as he failed to
meet his evidentiary burden of showing that his counsel was ineffective.

19 Exhibit 122, pp. 9-10 (#26) (footnotes omitted). Counsel's strategy must be put into the context of
20 the case. In its decision on direct appeal, the Nevada Supreme Court accurately summarized the
21 facts of the case:

22 On July 7, 1997, Lavoll approached [N. B.] and propositioned him for oral sex.
23 When [N. B.] refused, Lavoll began to tap his fingers against a gun that he wore for
24 his employment as a security guard. Lavoll propositioned [N. B.] once again, at
25 which time, [N. B.] stated that he would think about it. It is from this incident that
Lavoll is charged with solicitation of a minor to engage in acts constituting crimes
against nature.

26 On or about that same day, Lavoll stayed overnight with [E. H.] and [E. H.'s] friend,
27 at the friend's home. On this night, Lavoll approached [E. H.] and requested that [E.
28 H.] allow Lavoll to perform oral sex upon him. After initially being rebuffed by [E.
H.], Lavoll persisted until [E. H.] no longer refused, at which time Lavoll performed
oral sex upon [E. H.]. [E. H.] testified that he agreed to allow Lavoll to perform oral

1 sex upon him because he was afraid that Lavoll would retrieve his gun. Lavoll was
2 charged with one count of sexual assault stemming from this incident.

3 On the following day, July 8, 1997, the three victims accompanied Lavoll to a
4 nearby fast food restaurant. Lavoll then solicited the two brothers, [I. B. and N. B.]
5 for oral sex, telling [N. B.] that [I. B.] would agree to allow Lavoll to perform oral
6 sex upon him if [N. B.] would agree to the same. [N. B.] declined the offer and
7 retreated to a friend's house, leaving [E. H. and I. B.] behind with Lavoll.

8 After [N. B.'s] departure, Lavoll, and [E. H. and I. B.] walked to a vacant lot behind
9 a supermarket. While in the vacant lot, Lavoll performed oral sex upon both [E. H.
10 and I. B.] twice. Both [E. H. and I. B.] testified that they were intimidated because
11 they knew that Lavoll carried a gun, and felt that they could not refuse Lavoll's
12 advances. For this incident, Lavoll was charged with two counts of sexual assault
13 with use of a deadly weapon.

14 After leaving the vacant lot, [E. H. and I. B.] returned to their respective homes and
15 [N. B.] confronted his brother, [I. B.], about Lavoll. [N. B.] then reported what had
16 transpired to his parents and the boys' parents then contacted [E. H.'s] mother. The
17 police were notified and Lavoll was arrested without incident.

18 Ex. 59, pp. 2-3 (#25).² Jorgenson and petitioner faced a dilemma: If the jury believed the victims,
19 then petitioner was guilty. There are no affirmative defenses, no justifications, no excuses to the
20 crimes charged that would have led to an acquittal. The prosecution presented a strong case to the
21 jury. Each victim's testimony was consistent both with his own prior statements and with the trial
22 testimonies of the other victims. Jorgenson was unable to develop any inconsistencies or other
23 issues that could have diminished any victim's credibility. Supporting the victims' testimonies
24 were petitioner's statements to police officers: He admitted everything but the criminal sexual acts,
25 which he denied committing. A jury could easily disregard petitioner's denials as self-serving,
26 based upon the other evidence presented at trial. In short, a defense argument that the prosecution
27 had not proven its case would have been futile..

28 On the other hand, Jorgenson's strategy, if successful, would have resulted in a
sentence much more favorable to petitioner. By law, the victims could not consent to the sexual
acts that petitioner performed upon them. However, by asking for an instruction on the lesser-
included offense of statutory sexual seduction and by arguing that the victims were willing

²The court has modified the manner in which the Nevada Supreme Court redacted the
victims' names to be consistent with other quotations and this court's own manner of redaction.

1 participants in the sexual acts, Jorgenson was hoping that the jury would find petitioner guilty of
2 statutory sexual seduction instead of sexual assault upon a minor. The penalty for sexual assault
3 upon a minor is severe, and the deadly-weapon enhancement makes the penalty even more severe.
4 Petitioner is serving five consecutive terms of life imprisonment with eligibility for parole on each
5 term beginning after twenty years. In contrast, for a person of petitioner's age at the time
6 committing statutory sexual seduction carries a minimum sentence no less than one year and a
7 maximum sentence of no more than five years. Nev. Rev. Stat. §§ 200.368, 193.130. Furthermore,
8 the use of a deadly weapon was not a question presented to the jury with respect to statutory sexual
9 seduction. See Ex. 15 (#24). If Jorgenson had persuaded the jury, then petitioner would have
10 served no more than 15 years in prison. Under those circumstances, the Nevada Supreme Court
11 reasonably applied Strickland. Reasonable jurists would not find this conclusion to be debatable or
12 wrong, and the court will not issue a certificate of appealability.

13 In ground 14, Petitioner claims that counsel provided ineffective assistance by not
14 moving for a mistrial after the court clerk cried during the testimony of one of the victims.
15 Respondents note that the transcript of the trial has no evidence that the court clerk cried.
16 Respondents also noted that petitioner had the opportunity in his state evidentiary hearing, at which
17 he was represented by counsel, to develop the facts behind this claim, but he did not. On this issue,
18 the Nevada Supreme Court held:

19 Ninth, appellant claimed that his trial counsel was ineffective for failing to move for
20 a mistrial when the court clerk cried in front of the jury during the victim's
21 testimony. Appellant failed to establish that his counsel was deficient or that he was
22 prejudiced. The record of appellant's trial contains no support for his claim that the
23 clerk of the court cried throughout the victims' testimony. Further, the testimony
24 taken at the evidentiary hearing did not address the clerk's conduct during the trial.
25 The only support for this claim was appellant's affidavit in which he stated that the
26 court clerk cried in front of the jury during the victims' testimony. In light of the
27 single averment and the lack of development of further evidence at the evidentiary
28 hearing despite the opportunity to do so, we conclude that the district court did not
err in denying appellant's claim as he failed to meet his evidentiary burden of
showing that his counsel was ineffective.

26 Exhibit 122, p. 10 (#26). Petitioner has not rebutted this finding with clear and convincing
27 evidence, and thus this court presumes that the finding is correct. 28 U.S.C. § 2254(e)(1). Given
28 that there was no evidence that the clerk of the court cried in front of the jury, the Nevada Supreme

1 Court's determination was a reasonable application of Strickland. Reasonable jurists would not
2 find this conclusion to be debatable or wrong, and the court will not issue a certificate of
3 appealability.

4 Ground 15 has three components. First, petitioner repeats his claim that counsel
5 should have objected to the filing of the amended information. Second, petitioner argues that
6 counsel did not investigate three other victims who did not testify but whose stories came through
7 in another victim's testimony. On these issues, the Nevada Supreme Court held:

8 Eleventh, appellant claimed that his trial counsel was ineffective for failing to
9 adequately prepare and investigate the case. Specifically, he asserted (1) counsel
10 anticipated that appellant would plead guilty to the crimes and thus did not prepare
11 for trial, (2) counsel should have sought the leave of the court for time to investigate
12 the State's new charge and victim, and (3) counsel did not investigate other boys that
13 were mentioned at trial. Appellant failed to establish that his counsel was defective
14 or that he was prejudiced by counsel's failure to investigate. "An attorney must
15 make reasonable investigations or a reasonable decision that particular investigations
16 are necessary." A petitioner asserting a claim that his counsel did not conduct a
17 sufficient investigation bears the burden of showing that he would have benefitted
18 from a more thorough investigation. As noted above, the State did not add a
19 completely new charge and victim, it merely amended an incomplete information to
20 reflect the charges for which appellant had been bound over. As appellant had been
21 bound over on the charge, counsel was able to question the victim about the
22 allegation at the preliminary hearing. Further, appellant failed to identify what facts
23 counsel could have discovered through additional investigation that would have
24 affected the outcome of the trial. Therefore, the district court did not err in denying
25 this claim.

26 Exhibit 122, pp. 11-12 (#26) (footnotes omitted). The court has already disposed of petitioner's
27 claim regarding the amended information, in ground 4. On the investigation claim, E. H. testified
28 about the night he stayed at a friend's home with petitioner. Present at the home were petitioner, E.
H., and three other boys. E. H. testified that when petitioner was pressuring him to engage in oral
sex, petitioner "bragged that he did it to [A. P.]³ and [C. L.], "it" being "[p]robably just about most

3Both prosecution and defense were aware of A. P., but he disappeared some time after
petitioner's arrest. Right before trial started, he reappeared. After the jury was empaneled, the
prosecution moved to let A. P. testify about what happened to him pursuant to Nev. Rev. Stat.
§ 48.045, which governs admission of evidence of uncharged acts. The judge ruled that A. P. could
testify only as part of the prosecution's rebuttal case. Ex. 11A, pp. 185-202 (#23). A. P. never
testified in the trial.

After the jury trial at issue in this action, Petitioner was indicted for four counts of sexual

1 sexual things you could think of.” Ex. 12A, pp. 190-91 (#23). Counsel objected to the questioning,
2 but he was overruled. E. H. also started to testify about what a third boy told him regarding
3 petitioner’s statements, but counsel successfully objected to the hearsay. Id., p. 170 (#23). In light
4 of counsel’s actions at trial, petitioner does not identify how additional investigation could have
5 affected the outcome of the trial. The Nevada Supreme Court reasonably applied Strickland.
6 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court will not
7 issue a certificate of appealability.

8 Third, petitioner argues that counsel should have called as witnesses members of
9 petitioner’s family, who could have rebutted the prosecution’s argument that petitioner was a
10 predator of children. On the issue of calling family members to testify, the Nevada Supreme Court
11 held:

12 Fourteenth, appellant claimed that his counsel was ineffective for failing to call
13 witnesses “who would have refuted the State’s claims regarding Petitioner being a
14 child predator.” He asserted that members of his family would have testified as
15 such. Appellant did not establish that his counsel was deficient or that he was
16 prejudiced. Appellant did not specifically identify the possible or potential witnesses
17 who would have offered the testimony. Further, he did not allege the specific facts
18 about which the witnesses would have testified that would have refuted the State’s
19 allegations. Therefore, we conclude that the district court did not err in dismissing
20 this claim.

21 Ex. 122, p. 14(#26) (footnote omitted). Petitioner had the burden of proving that counsel was
22 deficient and that he suffered prejudice. In light of the specific accusations leveled against him by
23 the victims, he needed to allege who these witnesses were and what their testimonies would have
24 been. He did not. Under those circumstances, the Nevada Supreme Court reasonably applied
25 Strickland. Reasonable jurists would not find this conclusion to be debatable or wrong, and the
26 court will not issue a certificate of appealability.

27 assault, upon A. P., of a minor under sixteen years of age with use of a deadly weapon. He agreed
28 to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to one count of sexual
assault. Ultimately, this court denied a habeas corpus petition with respect to that conviction, and
the court of appeals affirmed. See Lavoll v. Grigas, 2:01-CV-00635-PMP-(LRL).

1 In ground 16, petitioner argues that counsel provided ineffective assistance by failing
2 to ensure that the sentences in this case and the sentence in the case involving A. P., described
3 above at page 17 and footnote 3, would run concurrently. On this issue, the Nevada Supreme Court
4 held:

5 Seventeenth, appellant claimed that his trial counsel was ineffective for failing to
6 ensure that appellant's sentences ran concurrent with the sentences in another case
7 that was also handled by the public defender's office. Appellant failed to
8 demonstrate that his counsel was deficient or that he was prejudiced. The record
9 indicated that appellant's counsel argued for concurrent sentences at appellant's
sentencing hearing. Moreover, the district court decides whether sentences are
imposed consecutively or concurrently. Therefore, the district court did not err in
denying this claim.

10 Exhibit 122, pp. 15-16 (#26) (footnotes omitted). In an omitted footnote, the Nevada Supreme
11 Court noted that the transcript of the sentencing hearing in this case is not available because court
12 reporters are required by law to keep their notes for eight years and because the transcript was
13 requested after that eight-year limit. Counsel did all that he could do to ensure that the sentences in
14 this case run concurrently with the sentence in the case involving A. P., but the ultimate decision
15 was with the district court. The Nevada Supreme Court reasonably applied Strickland.

16 Additionally, this court has the benefit of petitioner's habeas corpus petition that
17 challenged the judgment of conviction in the case involving A. P., and that petition shows that
18 ground 16 has no basis in fact. The sentence in the case involving A. P., C146525, does run
19 concurrent with the sentence in the case at issue, C144545. See Lavoll v. Grigas, 2:01-CV-00635-
20 PMP-(LRL), Third Amended Petition, Exhibits 4, 5 (#65). Ground 16 is without merit. Reasonable
21 jurists would not find this conclusion to be debatable or wrong, and the court will not issue a
22 certificate of appealability.

23 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (#7) is
24 **DENIED**. The clerk of the court shall enter judgment accordingly.

25 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

26 DATED: November 30, 2010.

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28 
PHILIP M. PRO
United States District Judge